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No. 86-515

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

JUDY'S FOODS, INC., *et al.*,

Petitioners,

vs.

A & B FOOD SERVICES CORP., *et al.*,

Respondents.

BRIEF IN OPPOSITION OF PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Excessive Fines Clause of the Eighth Amendment bars the imposition, in a civil case, of punitive damages that are as much as 35 times greater than the actual damages found.

2. Whether the Due Process Clause bars the imposition of punitive damages absent evidence that satisfies the "clear and convincing" standard of proof.

PARTIES TO THE PROCEEDING AND STATEMENT PURSUANT TO SUP. CT. RULE 28.1

The following were appellants in the Court of Appeals and are petitioners in this Court: Judy's Foods, Inc., General Care Corporation, Marvin P. Friedman and Joel Gordon. Judy's Foods, Inc. is a wholly-owned subsidiary of General Care Corporation which, in turn, is a wholly-owned subsidiary of Hospital Corporation of America.

The following were appellees in the Court of Appeals and are respondents in this Court: MC Management Corporation No. 4, MC Management Corporation No. 7 and A & B Food Services Corporation.

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BRIEF IN OPPOSITION OF PETITION FOR WRIT OF CERTIORARI

SUMMARY OF ARGUMENT

The Respondents purchased a franchise to construct Judy's Homestyle Hamburger and Fixin Restaurants in Philadelphia, Pennsylvania from the Petitioner, Judy's Food, Inc. (hereinafter Judy's). The Petitioner, Judy's was a wholly-owned subsidiary of the Petitioner, General Care Corp. (hereinafter "General Care"). The individual Petitioners, Marvin Friedman (hereinafter "Friedman") and Joel Gordon (hereinafter "Gordon") were Chairman of the Board, and Vice Chariman of the Board, respectively, of both corporate Petitioners. These men actively participated in the sales of franchises and operations of the franchisor's restaurants.

Respondents were awarded a judgment for compensatory and punitive damages from the Petitioners based upon the jury's finding of fraudulent concealment and constructive fraud. This judgment was approved in the trial court and affirmed by the United States Court of Appeals for the Sixth Circuit.

The Respondents' argument in opposition to the Petition for a Writ of a Certiorari may be summarized as follows:

I

That the Petitioners' failure to raise the alleged Constitutional issues prior to their Petition for Rehearing and Suggestion for Rehearing *En Banc*, constitutes an irrevocable waiver and therefore the Petition for Certiorari should be denied. The Respondents rely upon Rule 46 of the *Federal Rules of Civil Procedure* and the applicable case law which requires the Petitioners to raise these issues in a timely fashion;

II

The Petitioners ask that this Court depart from its historical position that the Eighth Amendment has no application in civil cases. *Ex parte, Watkins*, 32 U.S. (7 Pet.) 568, 574 (1833). This Court has recently held that the Eighth Amendment is not applicable to civil actions. *Whitley vs. Albers*, ___ U.S. ___, 106 S.Ct. 1078 1084 (1986); *Ingraham vs. Wright*, 430 U.S. 651, 666 (1977). If the Court reverses its previous holdings and applies the Eighth Amendment to civil cases, Tennessee law applies the correct Constitutional standard by assessing the reasonableness of the award of punitive damages in light of the egregiousness of

the Defendants' acts and the financial worth of the Defendants. The more reprehensible the acts, the greater the award of punitive damages. *Coppinger Color Lab, Inc. vs. Nixon*, 698 S.W.2d 72, 75 (Tenn. 1985). All the Courts below have reviewed and approved the judgments against the Petitioners in this case.

III

That the Due Process Clause does not mandate that a Defendant's culpability for punitive damages must be established by clear and convincing evidence. *Smith vs. Wade*, 461 U.S. 30, 49, 52-55 (1983); *Curtis Publishing Co. vs. Butts*, 388 U.S. 130, 160 (1967). The standard of proof in civil cases has historically been reserved to the states. *Addington vs. Texas*, 441 U.S. 418, 430-431 (1979).

For these reasons, Respondents assert that the Petition for Writ of Certiorari is without merit and should be denied.

ARGUMENT

I. THE ISSUES RAISED IN THE PETITION ARE UNTIMELY AND HAVE BEEN WAIVED.

The two issues presented in the Petition for Writ of Certiorari were not raised at the trial of this case nor were these issues briefed or argued in the United States Court of Appeals for the Sixth Circuit. The first time the Petitioners presented these issues was after oral argument when a supplemental brief was filed. The Petitioners filed this supplemental brief on the same day the Court of Appeals rendered its opinion affirming the District Court's ruling. (Appendix A) The Sixth Circuit court later rejected the

Petitioners' untimely issues by denying their Petition to Rehear. (Appendix B)

Rule 46 of the *Federal Rules of Civil Procedure* is clear on the issue of waiver. It states:

> Formal exceptions to rulings or orders of the court are unnecessary; but for all purposes for which an exception has heretofore been necessary, it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take or his objection to the action of the court and his *grounds* therefor; and, if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection does not thereafter prejudice him. [Emphasis added]

The Petitioners failed to object to the Court's charge on the basis of either the Eighth Amendment or the Due Process Clause. Thus, the Petitioners did not afford the trial court an opportunity to consider the alleged errors on the grounds on which they now rely.

> Although formal exceptions are no longer necessary Rule 46 requires that a party, at the time of the ruling or order of the court is made or sought, make known to the court the action that he desires the court to take or his objection to the action of the court and his grounds therefor. This requirement is imposed so the court may have an opportunity to avoid error. [footnote omitted] The requirement is not a mere technical formality

> and is essential to the orderly administration of justice. [footnote omitted] . . .
>
> The rule is enforced because neither the trial court, on a motion for new trial, nor the appellate court, on appeal, will ordinarily take note of errors that were not pointed out to the Court by the party at the proper time. Wright & Miller, *Federal Practice and Procedure*, §2472, pp. 454, 455.

The Petitioners failed to raise either "constitutional objection" during the trial of this cause or the pendency of the appeal. In *Duignan vs. United States*, 274 U.S. 195, 200 (1927), this Court rejected the Appellant's argument that he had been denied the right to a jury trial in violation of the Seventh Amendment of the Constitution and that the forfeiture of the Appellant's lease was a denial of the Due Process Clause under the Fourteenth Amendment. The Court held:

> The court below in enumerating the questions raised and presented made no mention of the constitutional question. The assignment of errors below did not refer specifically to it as required by the rules of that court, and so far as the record discloses, it was not presented there. See *United States vs. Gaffney*, 10 F.2d 694, 696. 274 U.S. at 200

This Court has refused to consider issues not presented in the trial court or in the Court of Appeals. *Tennessee vs. Dunlap*, 326 U.S. 312, 316, n. 3 (1976). (Refused to consider whether Respondent had a property interest in reenlistment because not plead in Complaint nor considered by District Court or Court of Appeals); *Rugendorf vs. United States*, 376 U.S.

528, 534 (1964). (Refused to disclose name of informant because basis for discovery not raised until reply brief in Court of Appeals); *Lawn vs. United States*, 355 U.S. 339, 362 n. 16 (1958). (Refused to consider whether trial court erred in not ordering the production of certain documents because issue not raised in the Court of Appeals); *Singleton vs. Wulff*, 428 U.S. 106, 120-121 (1976) (issue not raised below).

The mandate of this Court has been observed by the Courts of Appeals in cases with facts analogous to the case at bar. In *Wells vs. Rushing*, 760 F.2d 660, 661 (5th Cir. 1985), the United States Court of Appeals, on the Appellant's *Petition for Rehearing*, held that the Appellant's attempt to raise new issues in her Petition to Rehear came "too late." *Jamestown Farmer Elevator, Inc. vs. General Mills, Inc.*, 552 F.2d 1285, 1295-96 (8th Cir. 1977). Issue raised only on rehearing would not be considered.

Apart from the lack of merit in the Petition for a Writ of Certiorari, the Petitioners' failure to timely advance their "constitutional objections" renders the Petition fatally defective.

II. AWARDS OF PUNITIVE DAMAGES ARE NOT SUBJECT TO THE EXCESSIVE FINES CLAUSE OF THE EIGHTH AMENDMENT.

The Petitioners allege "Both the history of this provision [Eighth Amendment] and recent decisions of this Court support the conclusion that this prohibition extends to excessive awards of punitive damages in civil cases."[1] (Petition, p. 6)

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[1] The Petitioners in support of the above-quoted proposition, fail to cite any decision by this Court or any Appellate Court. Rather, the Petitioners rely on two law review articles. *See*, e.g.,

In *Ex parte, Watkins*, 32 U.S. (7 Pet.), 568, 574 (1833), this Court more than 150 years ago concluded that, "the Eighth Amendment is addressed to Courts of the United States exercising criminal jurisdiction."

In *Ingraham vs. Wright*, 430 U.S. 651 (1977), the Court reaffirmed the exclusive application of the Eighth Amendment to criminal proceedings. Justice Powell's opinion noted that Petitioners' argument that the Eighth Amendment applies in civil cases was neither new nor unique. He stated:

> The Eighth Amendment provides: 'Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.' Bail, fines, and punishment traditionally have been associated with the criminal process, and by subjecting the three to parallel limitations the text of the Amendment suggests an intention to limit the power of those entrusted with the criminal-law function of government. An examination of the history of the Amendment and the decisions of this Court construing the proscription against cruel and unusual punishment confirms that it was designed to protect those convicted of crimes. 430 U.S. at p. 664.
>
> . . .
>
> In the few cases where the Court has had

Jeffries, A Comment On The Constitutionality of Punitive Damages, 72 Va. L.Rev. 139 (1986). Professor Jeffries concedes in his first footnote that this comment grew out of work for a law firm and "was therefor, in origin, not disinterested." 72 Va. L.Rev. at 139. In the last paragraph of Professor Jeffries' comment, he admits that his aim is ". . . merely to open the debate." *Id.* at 158.

> occasion to confront claims that impositions outside the criminal process constituted cruel and unusual punishment, it has had no difficulty finding the Eighth Amendment inapplicable. . .430 U.S. at pp. 667-668.

This year the Court reaffirmed *Ingraham* in *Whitley vs. Albers*, ___ U.S. ___ , 106 S.Ct. 1078 (1986). Factually, the case involved an inmate who was shot and severely wounded near the end of a riot at the Oregon State Prison. The inmate charged that he was entitled to recover damages against various prison officials under 42 U.S.C. §1983, alleging, *inter alia*, that these officials had violated his rights under the Eighth and Fourteenth Amendments. The Court, in an opinion by Justice O'Connor, reaffirmed its historical position saying:

> The language of the Eighth Amendment, '[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted,' manifest 'an intention to limit the power of those entrusted with the criminal-law function of government.' *Ingraham vs. Wright*, 430 U.S. 651, 664 (1977). The Cruel and Unusual Punishment Clause 'was designed to protect those convicted of crimes.' *ibid.*, and consequently the Clause applies 'only after the State has complied with the constitutional guarantees traditionally associated with criminal prosecutions.' *Id.*, at 671, n. 40. See also *Revere vs. Massachusetts General Hospital*, 463 U.S. 239, 244 (1983); *Bell vs. Wolfish*, 441 U.S. 520, 535, n. 16 (1979). ___ U.S. ___ , 106 S.Ct. 1078, 1084 (1986).

In light of this Court's uniform recognition of the inapplicability of the Eighth Amendment to civil cases, it is difficult to understand the Petitioners' representation that the application of the Eighth Amendment in civil cases presents an "important constitutional question." (Petition, p. 10)

Petitioners conclude the historical portion of their Petition for a Writ of Certiorari with the statement that:

> Because the English bar against excessive fines applied to civil fines, it therefore follows that the Excessive Fines Clause of the Eighth Amendment also applies to punitive damages. (Petition pp. 8, 9)

Petitioners cite no authority for the foregoing proposition. The absence of citation is even more troublesome in light of the opposite conclusion having been reached by this Court in *Ingraham* and *Whitley*.

Punitive damages are a civil remedy. All civil fines or penalties which act to punish are not penal. *Ingraham vs. Wright*, 430 U.S. at p. 670, n. 39; *See, Gertz vs. Welch*, 418 U.S. 442, 460 (1977). The fact that they may be penal in nature does not activate the constitutional protections applicable in criminal cases. *See, U.S. v. Ward*, 448 U.S. 242, 248 (1980).

The distinction between civil and criminal cases is borne out of practical considerations. A commentator on this subject has noted:

> Although some crimes are punishable only by fines, most are also punishable by imprisonment. The punitive damages defendant,

> however, never faces the threat of imprisonment.
>
> In addition, a prior punitive damages award, unlike a criminal conviction, cannot be used to impeach a person when he testifies in a subsequent trial. Convicted felons may forfeit various civil rights, but punitive damages awards produce no such result. Lawyers can be disbarred for conviction of any of several crimes, but not for an adverse punitive damages judgment. Employers commonly ask whether an applicant has been convicted of a crime, but they do not ask whether punitive damages have been assessed against the applicant . . . Wheeler, *The Constitutional Case for Reforming Punitive Damages Procedures*, 69 Va. L.Rev. 269, 283-284.

The Petitioners support of their tortured effort to apply the Eight Amendment to punitive damage awards in civil cases, relying upon the criminal case of *Solem vs. Helm*, 463 U.S. 277, 284-288 (1983).[2] Clearly, *Solem* does stand for the proposition that in *criminal* cases the Eighth Amendment requires that

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[2] Petitioners omitted the footnote of the Supreme Court in *Solem*. (463 U.S. at 286, n. 11). Doubtless, this is because the note cited the criminal case of *O'Neal vs. Vermont*, 144 U.S. 323 (1892), where the Defendant unsuccessfully sought to assert the Eighth Amendment prohibition against cruel and unusual punishment insisting that a fifty-four (54) year sentence for selling intoxicating liquor without authority was unconstitutional. The footnote reveals that the majority did not reach this contention because the Appellant failed to include that point in his assignment of errors or his brief. Petitioners in the case at bar have committed the same waiver.

punishment be proportionate to the crime. Petitioners' bootstrap argument then proceeds:

> And since punitive damages are fines within the meaning of the Excessive Fines Clause, punitive damages cannot be disproportionate to the offense.
>
> The punitive damages awarded in this case are disproportionate and therefore excessive under the Eighth Amendment. To begin with, the aggregate punitive damages award of $850,000 is more than nineteen times the aggregate compensatory award of $44,000. (Petition, p. 9)

In the foregoing paragraph, the Petitioners make a quantum leap from this Court's application for a proportionality rule relating *criminal* punishment to the nature of the crime, to an alleged proportionality rule in *civil* cases requiring proportionality between the amounts of compensatory and punitive damages (ignoring the Petitioners' conduct). A review of the record in this case would show why the Petitioners never compare the punitive damages award with their conduct.

This Court has long recognized that punitive damages are assessed in civil cases according to the severity of the Defendants' misconduct, rather than the injury suffered by the Plaintiff. In *Day vs. Woodworth*, 54 U.S. (13 How.) 363, (1851) this Court held:

> It is a well-established principle of the common law, that in actions of trespass and all actions on the case for torts, a jury may inflict what are called exemplary, punitive, or vindictive damages upon a Defendant, hav-

> ing in view the enormity of his offense rather than the measure of compensation to the Plaintiff. 54 U.S. at 371.

The Court of Appeals in this case has noted that Tennessee observes a proportionality test with regard to punitive damages quite similar to that advanced in *Day*. The Court of Appeals held:

> Moreover, while defendants argued that plaintiffs failed to prove a reasonable relationship between the punitive damages and actual injury, Tennessee has never adopted the reasonable relationship test. Instead, Tennessee courts have ruled that punitive damages 'are allowed as punishment of the wrongdoer and are not based so much upon the nature and extent of the injury as they are upon the oppression of the party who does the injury.' *Lazenby vs. Universal Underwriters Insurance Co.*, 214 Tenn. 639 , 642, 383 S.W.2d 1, 4 (1964); *Johnson vs. Husky Industries, Inc.*, 536 F.2d 645, 650 (6th Cir. 1976); *Cathey vs. Johns-Manville, supra.* (Appendix A, p. 5a).

In *Coppinger Color Lab, Inc. vs. Nixon*, 698 S.W.2d 72 (Tenn. 1985), corporate tenants of a building and an adjoining homeowner sued the Defendant, who had hired an arsonist to burn his building in order to collect insurance proceeds. The jury verdict awarded the corporate tenant Fifty Thousand Dollars ($50,000.00) in compensatory damages and One Hundred Thousand Dollars ($100,000.00) in punitive damages. The same jury awarded the adjoining homeowner Fifty-three Thousand Dollars ($53,000.00) in

compensatory damages and Four Hundred Fifty Thousand Dollars ($450,000.00) in punitive damages. These awards were approved by the Court of Appeals and a discretionary review was granted by the Supreme Court of Tennessee. The Tennessee Supreme Court held that the oppressiveness of the Defendant's act toward the homeowner (who narrowly escaped death when her home was engulfed by flames), justified a greater award of punitive damages. The Court stated that "whereas the Defendant could foresee that the fire would result in only property damage to those Plaintiffs [corporate tenants], he could foresee the threat of injury or death of Ms. Gordon [homeowner] and others in her household if the fire should engulf her home as it did." *Id.* at 74-75. The Court found that "the intentional burning of a person's personal residence is much more reprehensible than the burning of a property used only for commercial purposes." *Id.* at 74. The Court held that, "the more reprehensible the act, the greater the appropriate award of punitive damages." *Id.* at 75.

Recently in *Silkwood vs. Kerr-McGee*, 464 U.S. 238 (1984), this Court stated that "punitive damages have long been a part of traditional state tort law." 464 U.S. at 255. The holding of the Tennessee Supreme Court in *Coppinger Color Lab, Inc.*, and the test applied to the award of punitive damages constitutes a valid enforcement of state tort law.

The amount awarded against each Petitioner was calculated to punish. The proper punishment to one man might be inadequate to sufficiently punish another, because of the difference in their financial status. *Breault vs. Friedli*, 610 S.W. 134, 136 (C.A. Tenn. 1980). The punitive damages awarded were

within "the range of reasonableness established by the proof." *Smith vs. Shelton*, 569 S.W.2d 421, 427 (Tenn. 1978)

Thus, the Tennessee "proportionality" test is properly focused on the severity of Defendants' misconduct and their financial worth, rather than the amount of Plaintiffs' compensatory damages. Although the assessment of punitive damage awards is within the jury's discretion, aggressive judicial control over these awards act as an added procedural safeguard. The Petitioners were protected from excessive jury verdicts by judicial control manifested by the trial court's power of remittitur and by the general rule that a verdict based upon prejudice cannot be sustained even when punitive damages are warranted. *Curtis Publishing Company vs. Butts*, 388 U.S. 130, 160 (1967). In this case, the jury, the trial judge, the three member panel of the Sixth Circuit, and the Sixth Circuit *en banc* (by refusal to rehear) have all confirmed the reasonableness of the award of punitive damages under the facts of this case. The Court of Appeals in considering whether the award of punitive damages against these Petitioners was excessive held:

> The Tennessee Supreme Court has recently directed that in assessing the reasonableness of awarded punitive damage consideration should be given to the egregiousness of a defendant's acts and the financial worth of the Defendant. 'The more reprehensible the act, the greater the award of punitive damages,' *Coppinger Color Lab, Inc. v. Nixon*, 698 S.W.2d 72, 75 (Tenn. 1985). *Defendants' acts in the instant case were certainly egregious and the punitive damages award, when*

> *viewed against Defendants' aggregate net worth of over thirty-seven million dollars, was not excessive.* [Emphasis added] (Appendix A, pp. 5a-6a)[3]

The conclusion by the Court of Appeals that the award of punitive damages in the case at bar was not excessive affirms the conclusion of the trial judge and the verdict of the jury. This is significant not only because of the weight to be accorded the jury and trial judge but also in light of the Petitioners' argument that Eight Hundred Fifty Thousand Dollars ($850,000.00) of punitive damages against Defendants' with net worth in excess of Thirty-seven Million Dollars ($37,000,000.00) who committed repeated acts of fraud and concealment is, *per se*, excessive and unconstitutional.

Petitioners have sought to pinion their Petition for a Writ of Certiorari on the dicta contained in *Aetna Life Insurance Company vs. Lavoie*, ___ U.S. ___, 106 S.Ct. 1580 (1986). In *Aetna*, Chief Justice Burger, writing for the majority, concluded that a judgment must be reversed because a Justice of the Alabama Supreme Court should have disqualified himself for interest in light of similar planned litigation in which he would participate as a party. In the last grammatical paragraph of the opinion before the actual mandate, Justice Burger wrote:

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[3] The proof showed without dispute that the corporate Petitioners had a combined net worth of almost Twenty Three Million Dollars ($23,000,000.00). The Petitioner Friedman's net worth was in excess of Eight Million Dollars ($8,000,000.00) and that of the Petitioner Gordon exceeded Six Million Five Hundred Thousand Dollars ($6,500,000.00). (TR. Vol. VIII, pp. 2811, 2812)

> Appellant also argues that the retrospective imposition of punitive damages under a new cause of action violates its rights under the Contracts Clause of Article I, Section 10; that a $3.5 million punitive damage award is impermissible under the Excessive Fines Clause of the Eighth Amendment; and that lack of sufficient standards governing punitive damage awards in Alabama violates the Due Process Clause of the Fourteenth Amendment. In addition, Appellant contends that Ala. Code §12-22-72 (1975), under which any person who unsuccessfully appeals a money judgment is assessed ten percent (10%) penalty, is unconstitutional under the Equal Protection Clause of the Fourteenth Amendment. These arguments raise important issues which, in an appropriate setting, must be resolved; however, our disposition of the recusal-for-bias issue makes it unnecessary to reach them. ___ U.S. ___ , 106 S.Ct. 1580, 1589 (1986)

The Respondents respectfully assert that the case at bar is not "an appropriate setting" to consider these Constitutional issues. First, the Petitioners have consistently failed to raise these issues below and therefore have waived them. Second, the Petitioners conduct as described by the Court of Appeals was "*certainly egregious*" and therefore the amount of punitive damages was not excessive.

III. THE PUNITIVE DAMAGES IN THIS CASE DO NOT VIOLATE THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

The Petitioners assert that "... the Due Process Clause required the Court to instruct the jury that it could award punitive damages only if it found by 'clear and convincing evidence' that the defendants had acted recklessly, willfully, or wantonly." (Petition, pp. 10-11) This proposition has been considered and held without merit by a recent decision of this Court. In *Smith vs. Wade*, 461 U.S. 30 (1983), the petitioner, Smith, an employee of the Missouri Department of Corrections, worked in the Algoa reformatory for youthful first offenders. The respondent, Wade, was awarded a jury verdict for compensatory and punitive damages upon proof that he was harassed, beaten, and sexually assaulted by two other inmates while Smith was in charge of his dormitory. The appeal questioned only the award of punitive damages. *Id.* at p. 33. The Petitioners offered two arguments:

> "... first, that actual intent is the proper standard for punitive damages in all cases under §1983; and second, that even if intent is not always required, it should be required here because the threshold for punitive damages should always be higher than that for liability in the first instance. 461 U.S. at 38.

The Court (Justice Brennan) found that the award of punitive damages was appropriate. Addressing the second part of the Petitioners' argument, e.g., that the threshold for punitive damages should always be higher than for liability in the first instance, the Court noted that such a conclusion would "... require a

departure from the rules of tort common law." 461 U.S. at 49. The Court stated:

> . . . Smith argues, the District Judge erred in not requiring a higher standard for punitive damages, namely, actual malicious intent.
>
> This argument incorrectly assumes that, simply because the instructions specified the same *threshold* of liability for punitive and compensatory damages, the two forms of damages were equally available to the Plaintiff. The argument overlooks a key feature of punitive damages—that they are never awarded as of right, no matter how egregious the defendant's conduct. 'If the Plaintiff proves sufficiently serious misconduct on the Defendant's part, the question whether to award punitive damages is left to the jury, which may or may not make such award.' D. Dobbs, Law of Remedies, 204 (1973) [footnote omitted by Court]. Compensatory damages, by contrast, are mandatory; once liability is found, the jury is required to award compensatory damages in an amount appropriate to compensate the Plaintiff for his loss. [footnote omitted] Hence, it is not entirely accurate to say that punitive and compensatory damages were awarded in this case on the same standard. To make its punitive award, the jury was required to find not only that Smith's conduct met the recklessness threshold (a question of ultimate fact), but also that his conduct merited a punitive award of $5,000 in addition to the com-

pensatory award (a discretionary moral judgment).

Moreover, the rules of ordinary tort law are once more against Smith's argument. There has never been any general common-law rule that the threshold for punitive damages must always be higher than that for compensatory liability. On the contrary, both the First and Second Restatements of Torts have pointed out that 'in torts like malicious prosecution that require a particular antisocial state of mind, the improper motive of the tortfeasor is both a necessary element in the cause of action and a reason for awarding punitive damages.' [footnote omitted] Accordingly, in situations where the standards for compensatory liability is as high as or higher than the usual threshold for punitive damages, most courts will permit awards of punitive damages without requiring an extra showing. Several Courts have so held expressly. [footnote . . . Johnson vs. Woman's Hospital, 527 S.W.2d 133, 141-142 (Tenn.App.), cert. denied (Tenn.1975)] . . . .

This common law rule makes sense in terms of the purposes of punitive damages. Punitive damages are awarded in the jury's discretion 'to punish [the defendant] for his outrageous conduct and to deter him and others like him from similar conduct in the future.' *Restatement (Second) of Torts*, §908(1) (1979). The focus is on the character of the tortfeasor's conduct whether it is of the sort that calls for deterrence and punishment over and

above that provided by compensatory awards. 461 U.S. at 51-54.

In the *Smith* case, the Judge instructed the jury that Wade could recover only if the Defendants were guilty of "gross negligence" or "egregious failure to protect." 461 U.S. at 33. With regard to punitive damages the District Judge charged the jury:

> In addition to actual damages, the law permits the jury, under certain circumstances, to award the injured person punitive and exemplary damages, in order to punish the wrongdoer for some extraordinary misconduct, and to serve as an example or warning to others not to engage in such conduct. . .
>
> The amount of punitive or exemplary damages as assessed against any defendant may be such sum as you believe will serve to punish that defendant and to deter him and others from like conduct. [Cite for transcript omitted] 461 U.S. at 33.

In the case at bar, Judge Wiseman's instruction was similar to that in *Smith* but went further and provided:

> Punitive damages may not be awarded when a Defendants' conduct is merely negligent and is not accompanied by malice or bad motive. In order for you to award exemplary or punitive damages, the Plaintiffs must prove that the Defendants' acts were characterized by fraud, malice, gross negligence, or oppression, or that the wrongful act was willfully done with a bad motive, or so reck-

> lessly as to imply a complete disregard of social obligations. Unless you find that such outrageous conduct occurred, you may not award punitive damages against any of these Defendants. Even if you find that such conduct occurred, however, you are not required to award punitive damages. The decision to award such damages lies in the jury's discretion. . .
>
> Among the factors which you may consider in assessing punitive damages are the following: The nature of the acts committed by the Defendants, the malice or wantonness of their acts, the motive for their acts, the manner in which the acts were committed, the injury intended or likely to result, the character and extent of the injuries suffered by the Plaintiffs, and the character of the Defendants. . . (Appendix C *Infra*, 9a-10a)

Thus, Judge Wiseman did separately charge the jury on the issue of punitive damages and, in fact, required a higher standard of culpability than that which was approved by this Court in *Smith*.

With regard to the Petitioners' insistence upon a higher burden of proof in cases involving punitive damages, this Court in *Curtis Publishing Co. vs. Butts*, 388 U.S. 130, 160 (1967), held that: ". . . there is, moreover, nothing in any of our past cases which suggests that compensatory and punitive damages are subject to different Constitutional standards of misconduct." The Court in this libel case, ruled on an argument similar to that contained in the Petition at bar stating:

> We would hold, therefore, that misconduct sufficient to justify the award of compensatory damages also justifies the imposition of a punitive award, subject of course to the limitation that such award is not demonstrated to be founded on the mere prejudice of the jury. . . 388 U.S. at 161.

The parallel of this ruling to a willful fraud case such as the case at bar is inescapable.

The Petitioners insist that, ". . . the Due Process Clause required the Court to instruct the jury that it could award punitive damages only if it found by 'clear and convincing evidence' that defendants had acted recklessly, willfully, or wantonly."[4] (Petition at pp. 10-11) The Petitioners are unable to cite any judicial authority supporting this proposition. Instead, the Petitioners cite five cases, each involving state-initiated action, where this Court found an absence of procedural due process safeguards. A brief discussion of these cases is appropriate.

In *Addington vs. Texas*, 441 U.S. 418 (1979), this Court held that the burden of proof for an *indefinite commitment to a state mental hospital* should be "clear and convincing."[5] In *Santosky vs. Kramer*, 455 U.S.

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[4] This is a new issue. The Court of Appeals rejected Petitioners' argument that Tennessee law required *fraud* be proved by a clear and convincing standard. (Petition Appendix A, p. 6a).

[5] In reaching its decision, the Court acknowledged: "The essence of federalism is that states must be free to develop a variety of solutions to problems and not be forced into a common, uniform mold." 441 U.S. at 431. This proposition is evidenced by the fact that as of 1986, 24 states have passed legislation regulating the award of punitive damages. Kenneth

745 (1982), this Court found that due process required "clear and convincing evidence" before *parental rights could be irrevocably terminated* with a natural child. In *Wisconsin vs. Constantineau*, 400 U.S. 433 (1971), this Court found that a hearing was required before the chief of police could "post" an individual in all liquor stores in his jurisdiction *forbidding the gift or sale of liquor* to that individual. In *Matthews vs. Eldridge*, 424 U.S. 319 (1976), this Court ruled that a hearing must be held before the Social Security Administration could *terminate disability benefit payments*. Finally, in *Colorado vs. New Mexico*, 467 U.S. 310 (1984), this Court required a clear and convincing evidence standard from Colorado before allowing diversion of the Vermejo River away from New Mexico in an *interstate water apportionment* case.

The Petitioners seek to equate these constraints on *governmental* decisions which deprive individuals of their livelihood, their children, their fundamental liberties or life-giving water with the "mere loss of money" *Santosky* 455 U.S. at 756. Petitioners suggest an unprecedented departure from the common law burden of proof in civil damage suits.

In *Calhoun vs. Baylor*, 646 F.2d 1158, 1163 (6th Cir. 1981), the Court of Appeals specifically held that:

> "Defendants also argue that the District Court should have instructed the jury that proof of fraud must be 'unequivocable and convincing.' The jury was instructed properly that Tennessee law requires proof by only a

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R. Redden, *Punitive Damages*, §5.2 pp. 161-506, Supp. pp. 276-303 (1986).

preponderance of the evidence." 646 F.2d at 1163.

Due process is not a technical conception unrelated to time, place, and circumstance. It is compounded by history, reason, and the past course of decisions. *Ingraham*, 430 U.S. at 675.

In this case, the entire spectrum of procedural and substantive protections afforded by the Federal judicial system have been enjoyed by the Petitioners. They would now seek to rewrite the common law and procedural rules of both the State of Tennessee and the federal judiciary in an effort to avoid the obligations decreed by a jury and affirmed by the trial court and the United States Court of Appeals.

CONCLUSION

Respondents submit that the Petition for a Writ of Certiorari is without merit, both procedurally and substantively. Respondents ask that this Court deny the Petition.

Respectfully submitted,

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DATED: October 24, 1986

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 85-5527

A & B FOOD SERVICES CORPORATION, M.C. MANAGEMENT CORPORATION #7, M.C. MANAGEMENT CORPORATION #8, AB MANAGEMENT CORPORATION #8,
Plaintiffs-Appellees,

v.

JUDY'S FOODS, INC.; GENERAL CARE CORPORATION; MARVIN FRIEDMAN; AND JOEL GORDON,
Defendants-Appellants.

On Appeal from the United States District Court for the Middle District of Tennessee

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Decided and filed June 3, 1986

Before: KRUPANSKY and GUY, *Circuit Judges*; and HOLSCHUH, *District Judge*

PER CURIAM. Defendants/appellants Judy's Foods Inc., General Care Corporation, Marvin Friedman and Joel Gordon (collectively referred to as "defendants")

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* Hon. John D. Holschuh, United States District Judge, Southern District of Ohio, sitting by designation.

appealed the jury verdict and denial of their motion for judgment notwithstanding the verdict in this diversity action.

In 1976, General Care Corporation, a Tennessee corporation, formed Judy's Foods, Inc. ("Judy's") for the purpose of owning, operating and franchising limited menu fast food restaurants under the name "Judy's Homestyle Hamburgers and Fixins." The individual defendants, Marvin Friedman and Joel Gordon, were officers, directors, and members of the Executive Committee of both Judy's and General Care Corporation.

Judy's solicited Agostine Malerba ("Malerba"), to become its franchisee in the greater Philadelphia area. In May, 1978, Malerba, relying upon the representations of Judy's, executed an agreement with Judy's, which granted to Malerba an option to franchise a total of fifteen Judy's restaurants in the geographical area of Philadelphia. Malerba assigned one-half of his interest in the franchisee agreements to his business partner, Buddy Cooperberg ("Cooperberg") and they in turn formed the three plaintiff corporations, A & B Food Services Corporation, M.C. Management Corporation # 4 and M.C. Management Corporation # 7 to construct and operate two Judy's franchises in Philadelphia. Malerba and Cooperberg were the sole stockholders of the corporate plaintiffs, and their franchise rights were assigned to the corporations. Plaintiff's completed the construction of two Judy's restaurants which commenced business operations during February and June of 1979. Both restaurants proved to be unprofitable and were closed in December of 1979 and October of 1980 respectively.

Thereafter, plaintiffs initiated this action in the federal district court charging the defendants with fraud, negligent misrepresentation, intentional failure to disclose vital business information, conspiracy, and breach of contract which caused substantial injury to the plaintiffs. At the conclusion of a three and one-half week trial, the jury

returned a verdict in favor of plaintiffs, having concluded that defendants had failed to disclose critical business information to the plaintiffs and had committed fraudulent concealment and constructive fraud. Defendants timely moved for a judgment notwithstanding the verdict or, in the alternative, a new trial. The court denied the motions and this appeal ensued.

Defendants' first assignment of error charged that the district court's submission of the issue of constructive fraud to the jury was improper. Defendants argued that an action for constructive fraud could be maintained only upon proof of a confidential relationship between plaintiff and defendant and that, as a matter of law, the facts of the case did not give rise to such a relationship. This assignment of error is disposed of by *Edwards v. Travelers Insurance Company of Hartford, Connecticut*, 563 F.2d 105, 114 (6th Cir. 1977) wherein this circuit reviewed the Tennessee law of constructive fraud and observed:

> A definition of constructive fraud was given in *Maxwell v. Land Developers, Inc.*, 485 S.W. 2d 869, 875 (Tenn. App.), *cert. denied*, (1972).
>
> > "Constructive frauds are acts, statements or omissions, which operate as virtual frauds on individuals, or which, if generally permitted, would be prejudicial to the public welfare, and are not clearly resolvable into mere accident or mistake, and yet may have been unconnected with any selfish evil design, or may amount, in the opinion of the person chargeable therewith, to nothing more than what is justifiable or allowable." Gibson's Suits in Chancery 5th Ed. Vol. II, § 982, p. 217. Constructive fraud may be established where there is a breach of legal or equitable duty, whether or not fraudulent intent be present. *Bank of Blount County v. Dunn*, (1929) 10 Tenn. App. 95.

> Failure to disclose thus becomes fraudulent when it is the duty of a party having the knowledge to reveal the facts to the other party. *Domestic Serving Machine v. Jackson*, 83 Tenn. 418, 424-25 (1885); *Dozier v. Hawthorne Development Co., supra*, 37 Tenn. App. 279, 262 S.W. 2d 705; *Georgia Marble Co. v. Standard Tile Co., supra*, 19 Tenn. App. 258, 86 S.W. 2d at 432.

The *Edwards* court went on to conclude that the "duty" to disclose known facts arises when there exists a "confidential relationship", which the court defined as:

> one in which "confidence is placed by one in the other and the recipient of that confidence is the dominant personality, with the ability, because of the confidence, to influence and exercise dominion over the weaker or dominated party." *Iacometti v. Frassinelli*, 494 S.W. 2d 496, 499 (Tenn. App.), *cert. denied* (Tenn. 1973).

In light of this circuit's pronouncements in *Edwards v. Travelers Insurance Co. of Hartford, Connecticut*, this court concludes that the trial court properly submitted the issue of the defendant's duty to disclose material business information to the plaintiff franchisees to the jury for disposition. Moreover, a review of the record disclosed that sufficient probative evidence supported the jury's decision that a relationship of confidence existed between the parties that required Judy's to disclose material facts that impacted upon the current and future viability of its entire franchising and business operations and the interrelated business operations of its individual franchisees which Judy's intentionally failed to do.

Defendants also asserted that the district court's refusal to grant a remittitur to reduce the jury's award of punitive damages was error because the award was excessive and disproportionate to the injuries suffered by the plaintiff. It should initially be noted that this circuit

has long adhered to the view that where, as here, a damage award has been determined by the jury and left undisturbed by the trial court, the award bears a presumption of correctness. As this court noted in *Manning v. Altec, Inc.*, 488 F.2d 127 (6th Cir. 1973):

> Where the jury finds a particular quantum of damages and the trial court refuses to disturb its findings on the motion for a new trial, the two factors press in the same direction, and an appellate court should be certain indeed that the award is contrary to all reason before it orders a remittitur or a new trial.

488 F.2d at 133 (quoting *Taylor v. Washington Terminal Company*, 409 F.2d 145, 148 (D.C. Cir.) *cert. denied*, 396 U.S. 835 (1969)). *See also Cathey v. Johns-Manville Sales Corp.*, 776 F.2d 1565, 1572 (6th Cir. 1985).

Moreover, while defendants argued that plaintiffs failed to prove a reasonable relationship between the punitive damages and actual injury, Tennessee has never adopted the reasonable relationship test. Instead, Tennessee courts have ruled that punitive damages "are allowed as punishment of the wrongdoer and are not based so much upon the nature and extent of the injury as they are upon the oppression of the party who does the injury." *Lazenby v. Universal Underwriters Insurance Co.*, 214 Tenn. 639, 642, 383 S.W.2d 1, 4 (1964); *Johnson v. Husky Industries, Inc.*, 536 F.2d 645, 650 (6th Cir. 1976); *Cathey v. Johns-Manville, supra.*

Viewing the evidence under the aforementioned standards, this court is constrained to conclude that the punitive damage awards were not "contrary to all reason." *Manning v. Altec, Inc., supra.* The Tennessee Supreme Court has recently directed that in assessing the reasonableness of awarded punitive damage consideration should be given to the egregiousness of a defendant's acts and the financial worth of the defendant. "The more repre-

hensible the act, the greater the award of punitive damages," *Coppinger Color Lab, Inc. v. Nixon*, 698 S.W. 2d 72, 75 (Tenn. 1985). Defendants' acts in the instant case were certainly egregious and the punitive damages award, when viewed against defendants' aggregate net worth of over thirty-seven million dollars, was not excessive.

This court having reviewed the defendants remaining assignments of error concludes that they are not well taken. For the foregoing reasons, the decision of the district court is AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 85-5527

A&B FOOD SERVICES CORPORATION, *et al.*,
Plaintiffs-Appellees,

v.

JUDY'S FOODS, INC., *et al.*,
Defendants-Appellants

[Filed Aug. 4, 1986]

Before: KRUPANSKY and GUY, *Circuit Judges*, and HOLSCHUH* *U.S. District Judge*

ORDER

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition

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* Hon. John D. Holschuh sitting by designation from the Southern District of Ohio.

were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman
JOHN P. HEHMAN
Clerk

APPENDIX C

EXCERPT OF THE JOINT APPENDIX FILED IN THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT CONTAINING A PORTION OF THE TRIAL COURT'S CHARGE (TR. Vol. II pp. 300-301)

* * * *

Punitive Damages. The plaintiffs have requested that in addition to compensating them by awarding them compensatory damages, you should award the plaintiffs "punitive damages." In certain cases, the law allows a jury to award an injured party punitive or exemplary damages. Such damages are awarded in excess of and in addition to compensatory damages. That is, punitive damages are not intended to compensate an injured party for personal injury or property damage, but to punish a party, to deter him from committing acts of a similar nature, and to make a public example of him.

Punitive damages may not be awarded when a defendant's conduct is merely negligent and is not accompanied by malice or bad motive. In order for you to award exemplary or punitive damages, the plaintiffs must prove that the defendants' acts were characterized by fraud, malice, gross negligence, or oppression, or that the wrongful act was willfully done with a bad motive, or so recklessly as to imply a complete disregard of social obligations. Unless you find that such outrageous conduce occurred, you may not award punitive damages against any of these defendants. Even if you find this such conduct occurred, however, you are not required to award punitive damages. The decision to award such damages lies in the jury's discretion.

You may not award punitive damages unless you also award compensatory or nominal damages. This is true even

if the defendants' actions were willful, malicious, fraudulent or oppressive.

Among the factors which you may consider in assessing punitive damages are the following: The nature of the acts committed by the defendants, the malice or wantonness of their acts, the motive for their acts, the manner in which the acts were committed, the injury intended or likely to result, the character and extent of the injury suffered by the plaintiffs, and the character of the defendants. In short, you should consider what will be a proper punishment for the defendants and what deterrent effect the award will have on others who contemplate committing similar acts. In assessing the size of a punitive damage award you may consider the net worth of the particular defendant.

The defendants seek a recovery under a theory of quantum meruit. Such an award is made when one party confers a benefit upon another even though he is under no duty to do so, and that in order to prevent the recipient of the benefit from being unjustly enriched equity directs that the recipient pay over the giving parting the value of

* * * *